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**TOWARD A DEFENSE OF FAIR USE ENABLEMENT,
OR HOW U.S. COPYRIGHT LAW IS HURTING MY DAUGHTER****Essay**

by JOSEPH P. LIU*

My interest in copyright law used to be almost entirely professional, but a recent event made it far more personal than I would like. This is the story of how U.S. copyright law is hurting my nine-year-old daughter.

I.

A.

Several months ago, my daughter Cate's after-school program ran a fund-raiser. The kids in the program were given a piece of paper and asked to draw something on it. Whatever they drew was to be sent to a company, which would then put the drawing on all manner of things — t-shirts, pot-holders, key chains, coffee mugs, you name it. These items would then be offered for sale to proud and eager parents, grandparents, and relatives. The after-school program and the company would split the profits. The children would proudly see their artwork valued and incidentally absorb an important lesson in merchandising. Everyone wins.

So my daughter dutifully produced the following picture of three cats (large, medium, and small), which generated brisk sales among the target market, and which I proudly reproduce here:

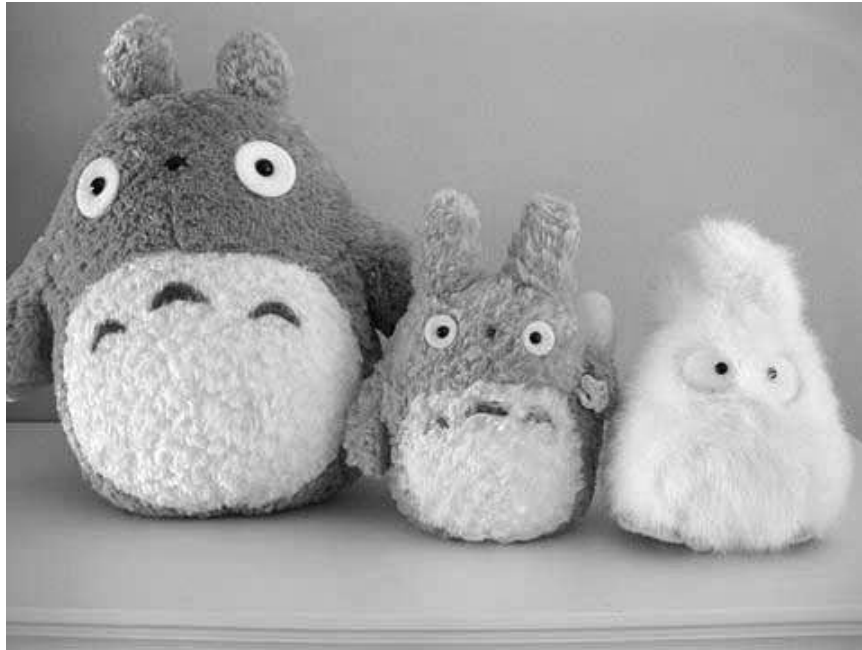
*Professor of Law, Boston College Law School. © 2010 by Joseph P. Liu. Thanks to Julie Cohen, Stacey Dogan, David Olson and Alfred Yen for helpful comments and suggestions.



When I first saw the drawing, I complimented my daughter and asked her how she had decided to draw the three cats in the picture. The choice seemed a bit peculiar to me, since my daughter is deathly allergic to cats and, as a result, views them with a mixture of fascination and fear, like cuddly poisonous snakes. She told me that she had originally started to draw, not three cats, but three Totoros. However, she changed her drawing in mid-stream, adapting her drawing to the new subject matter.

For those not familiar with Totoro, he (or it) is a character from an animated film, *My Neighbor Totoro*,¹ by the famous Japanese animator Hayao Miyazake. Totoros can come in various sizes: large, medium, and small. They look something like this:

¹ *TONARI NO TOTORO* (Tokuma Japan Communications Co., Ltd. 1988).



Having seen the movie many times, my daughter was a huge fan. So, quite naturally, she started drawing three Totoros on her piece of paper.

Soon after she started, however, she was gently told by one of her after-school teachers that she could not, in fact, draw the Totoros as she had wished. According to the teacher, the rule was that the children could not draw any characters that were “famous.” So, having begun to outline her Totoros on her piece of paper, she quickly adapted her drawing and turned it instead into the drawing of the three Totoro-shaped cats. My daughter accepted the change without much fuss.

The same could not be said of me. As a copyright scholar, I immediately understood the reason for the rule: copyright law. At the time, I guessed (correctly, it turned out) that the rule had probably been handed down, not by the after-school teachers, but by the company that would produce the purchased items. The company implemented the rule, not because they hated children, but because they were concerned about potential copyright liability. They were worried that they could be sued by the owners of “famous” characters like Totoro, Batman, Barbie, and the like.

Although I recognized the reason for the rule, I was nevertheless upset, though I tried (unsuccessfully) to hide this from my daughter. My daughter loves to draw. Like many children, she expresses herself through

her drawings. And like many children (and adults, for that matter), she often copies what she sees around her. Until recently, she had made little distinction between drawing things she saw in the physical world and things she saw on screen or in print. It troubled me greatly to hear that she had been told, in effect, not to express herself creatively in the way she wished, that certain images were off-limits. Not because they were inappropriate in any way for a child, but because they violated U.S. copyright law.

After she told me this story over dinner, I told her that I thought she probably could have gone ahead and drawn the Totoros and that nothing bad would have happened. My daughter knows that I am a law professor, and she knows that I specialize in something called “copyright law,” though the outlines of the area are rather hazy to her. She is a very rule-oriented girl and once asked if I could come to her class and “explain the law” to the unruly boys in her class. Yet none of my credentials could shake her firm belief that it was improper for her to draw anything “famous” on that piece of paper. Because, as everyone knows, dads don’t really know anything about what goes on in school.

B.

As it turns out, my daughter may well have been right. After my initial bout of fatherly outrage, I stepped back, put on my professional hat and asked myself: if I were the lawyer for the company that made these items, would I have instituted a similar rule? And the answer is a definitive yes. In fact, it’s not even close. Without such a rule, the company could potentially be exposed to massive copyright liability.

Here’s why. Copyright law gives the copyright owner the exclusive right to reproduce the work and to create derivative works based on the original work.² So the owner of the copyright in depictions of Totoro or Batman or Barbie has the right to prevent others from reproducing those works. This would, in theory, extend to someone’s drawing of those copyrighted characters. Even a drawing of Batman by a nine-year-old in school could, strictly speaking, be a violation of the reproduction or derivative work right.

Now of course, such a drawing by a nine-year-old would almost certainly be fair use.³ Fair use is a defense to copyright infringement, and in assessing whether a use is fair, courts look to various factors, including: (1) the purpose and character of the use; (2) the nature of the work copied; (3) the amount used; and (4) the impact on the market for the work. The use by the nine-year-old is a non-commercial use, done in an educational

² 17 U.S.C. § 106 (2006).

³ *Id.* § 107.

setting. The use is creative and transformative. Moreover, there is no conceivable harm to the market. Batman is safe from the economic threat posed by grade-schoolers across the country. So there would likely be no liability here, just as my daughter would not have been liable for her drawing of the Totoros on her piece of paper.

Yet the same could not be said of the company that produced the key chains, coffee mugs, and t-shirts. The company, in putting a child's drawing of Batman on a poster or coffee mug or key chain, would also be making a reproduction of, or derivative work based upon, the copyrighted work. There would be a clear, *prima facie* case of infringement. The Copyright Act provides for statutory damages of between \$750 and \$30,000 for each work infringed.⁴ Multiply that by thousands of drawings of thousands of different copyrighted works by thousands of children around the country, and you have the potential for massive copyright liability.

Would the company, like the children, be able to take advantage of a fair use defense? Here, the answer is probably no. Applying the four fair use factors to the company leads to a very different conclusion. The biggest problem is that, unlike the children's use, the company's use is clearly commercial. The company is profiting from the infringing activity. It is not engaging in a use for educational purposes. Furthermore, the company, as a large-scale commercial entity, could have secured licenses from the owners of the various copyrights. In failing to do so, the company is depriving the copyright owners of valuable licensing revenue in the market for, say, Batman-themed posters, key-chains, and coffee mugs. Thus, a court could quite easily conclude that the company's actions are not fair use.

C.

At one level, it makes sense to treat the company and the children differently. The children present no risk to the economic interests of the copyright owners. Their use is creative and transformative — exactly the kind of use copyright privileges. Copyright would be intolerable if its effect was to prevent children from exercising their imaginations. By contrast, the company is not engaging in much of a transformative use itself. It is a commercial entity, profiting from the infringing activity. It has the means to secure a license from the copyright owners. Thus, in one sense, the company should quite properly be treated differently.

However, as the example of my daughter highlights, the interests of the children and the interests of the company are not so neatly separated. This is because imposing liability on the company affects the creative options available to the children. Imposing liability on the company leads to

⁴ *Id.* § 504(c)(1).

a rule that the children cannot draw what they like. It narrows the realm within which they can be freely expressive, the realm within which they can copy as much as they want. The children are told, quite expressly, that there are limits to their creativity.

Now, one could certainly argue that this is something we should not be terribly concerned about. The children remain free to exercise their own fair use privileges. They can copy as much as they want in their classrooms. Nothing is preventing them from engaging in all sorts of non-commercial uses of copyrighted works. The inability to then have their work pasted on t-shirts and coffee mugs is not a huge tragedy. They should not have any right to see their work on these kinds of items.

Yet this perspective is, I think, unduly narrow. Start with the proposition that we want to encourage children to exercise their imaginations. We want them to freely copy and transform what they see, regardless of whether it is copyrighted or not. When they make their own drawings of Batman or Barbie, this is something we celebrate and praise, not something we grudgingly permit. If what the children do is an affirmative good, we should be attentive, not only to their formal legal rights, but to the conditions surrounding the exercise of these rights. We should care just as much about the environment within which they exercise their creativity. We should make sure that the conditions encourage creativity and allow children to exercise their imaginations as fully as possible.

This attention to the conditions that enable creativity and fair use has, I believe, been largely missing from copyright law. Copyright law has historically given private individuals reasonably broad fair use privileges. It has been less sympathetic, however, to intermediaries that facilitate the ability of individuals to exercise these privileges. In fact, it has largely viewed intermediaries, not as facilitators of fair use, but as facilitators of infringement.⁵

In the rest of this Essay, I will explore the doctrinal and theoretical foundations for this view, and I will suggest that it misses something important. A better approach would look more broadly not only at the theoretical availability of a fair use defense, but at the practical ability of individuals to fully exercise their fair use rights and privileges.⁶ Specifi-

⁵ See *infra* Part II.A.

⁶ Note that I will use the terms “right” and “privilege” interchangeably in this Essay when referring to the fair use interests of individuals. *Contra* WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (1919). Commentators sometimes disagree over whether fair use is properly viewed as a right, a privilege, a defense, an immunity, or something else entirely. This disagreement is beyond the scope of this short Essay. As will be clear *infra*, I do believe that some individuals have affirmative fair use interests, which copyright law should recognize, regardless of what terminology we adopt.

cally, such an approach would look carefully at how liability for intermediaries affects the fair use privileges of individuals. I will argue that this interest should find doctrinal expression through a defense of fair use enablement.⁷

Finally, I will suggest that this perspective has implications beyond the narrow example of my daughter, mentioned above. Copyright law draws no distinction between creative children and creative adults. We have, in each of us, the potential to create, to build upon the works of others. And as others have noted, dramatic changes in digital technology have given us far greater ability to exercise these creative impulses and to share the results with others.⁸ Today, individuals can manipulate and transform copyrighted works with ever more sophistication and share the results easily with a world-wide audience. We need to be particularly careful to ensure that the conditions that enable and encourage this kind of creative impulse continue to exist. A defense of fair use enablement would help create the kind of breathing space that would allow this creative impulse to flourish.

II.

A.

As I have noted above, courts have generally not been very sympathetic to attempts by companies to invoke the fair use claims of their customers.⁹ Instead, courts have generally ignored these claims, choosing instead to measure fair use from the perspective of the companies themselves. Indeed, in some cases, neither the courts nor the parties appear to recognize that the fair use claims of customers might even be relevant.

The most explicit rejection of this kind of argument can be found in a series of cases from the 1990s involving photocopy shops.¹⁰ At issue in

⁷ I introduced a version of this argument in an earlier conference paper, Joseph P. Liu, *Enabling Copyright Consumers*, 22 BERKELEY TECH. L.J. 1099 (2007). The goal of this Essay is to develop this idea in a more detailed fashion. See also Llewellyn Joseph Gibbons, *Entrepreneurial Copyright Fair Use: Let the Independent Contractor Stand in the Shoes of the User*, 57 ARK. L. REV. 539 (2004).

⁸ See, e.g., LAWRENCE LESSIG, REMIX: MAKING ART AND CULTURE THRIVE IN A HYBRID ECONOMY (2008).

⁹ I am focusing here on direct infringement cases. This is not the case with respect to indirect copyright infringement cases, where the fair use claims of customers play an important role. See, e.g., *Sony v. Universal City Studios*, 464 U.S. 417 (1984). I discuss the indirect infringement cases in more detail in Part II.C *infra*, and explain why, doctrinally, these cases are treated differently, even though there are good reasons to treat them similarly.

¹⁰ See *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381 (6th Cir. 1996) (en banc); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

these cases was whether photocopy shops like Kinko's were liable for assembling and copying packets of copyrighted readings, or "coursepacks," on behalf of college professors. The professors selected articles and chapters of books that they wanted to assign for a particular class. They then gave the articles and books to the photocopy shops, which would then make photocopies of these selections, bind the copied materials, and sell them to the students for a profit. The students benefited from this practice, since they could get the readings without having to pay for all of the books in which the excerpts appeared. The owners of the copyrights in the copied books and articles, however, were not so happy with this arrangement, and they sued the copy shops for copyright infringement.

The copy shops raised a fair use defense.¹¹ Specifically, they pointed to the potential fair use arguments of the college and graduate students who purchased the coursepacks. If the students themselves had individually assembled and photocopied the coursepacks, they would have had a colorable fair use argument, in light of the minimal amount of copying and the educational purpose of the copying. The copy shops argued that their actions merely made this process more efficient and that they should be entitled to the benefit of the students' fair use arguments. It would, they argued, be anomalous to penalize them for simply facilitating what the students themselves could do individually.

Indeed, a dissenting opinion in the one of these cases, *Princeton University Press v. Michigan Document Services*, largely accepted this view. The dissent first noted that it believed the students would have had a successful fair use defense if they had made the coursepacks themselves. It then went on:

Given the focus of the Copyright Act, the only practical difference between this case and that of a student making his or her own copies is that commercial photocopying is faster and more cost-effective. Censuring incidental private sector profit reflects little of the essence of copyright law.¹²

Under this view, the photocopy shops were merely helping the students more efficiently exercise their fair use privileges. Accordingly, the photocopy shops should be entitled to raise the fair use arguments of their customers.

The majority in that case, however, expressly rejected this argument, refusing even to consider the potential fair use arguments of the students:

As to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt. *We need not decide this question*, however, for the fact is that the

¹¹ *Princeton*, 99 F.3d at 1385.

¹² *Id.* at 1393 (Martin, C.J., dissenting).

copying complained of here was performed on a profit-making basis by a commercial enterprise.¹³

The majority thus refused to permit the copy shops to stand in the shoes of the students and assert their fair use defense. Instead, the court applied the fair use factors from the perspective, not of the students, but of the copy shops themselves. In so doing, it found that the activities of the copy shops were clearly commercial, not educational; that the copying was non-transformative; and that the copy shops' actions deprived the copyright owners of potential revenues, both in the form of lost sales of books and articles, as well as lost potential licensing revenues.¹⁴

Note that under the majority's analysis, the fair use arguments of the students and professors were not just potentially weak, but irrelevant. The majority implied that it did not agree with the dissent's conclusion that the copying would have been fair use if done by the students. More than that, however, the majority indicated that this was entirely beside the point, because *even if the students had a valid fair use defense*, it would have made no difference. That is, even if the copy shops were facilitating concededly fair uses by the students, the copy shops would be liable. They would not be able to invoke the fair use rights of their customers. Instead, fair use had to be measured from the perspective of the copy shops alone.

This same issue arises in other copyright cases as well, although it has not been expressly litigated nor even widely recognized. In the recent case *Cartoon Network v. CSC Holdings*¹⁵ a cable television company, Cablevision, provided a service that allowed cable customers to record television shows for later viewing, in much the same way a customer could record shows using a digital video recorder (DVR) such as a TiVo. The difference, however, was that instead of giving the viewer a DVR to operate in his or her home, the cable company recorded the shows, at the viewer's behest, on a computer hard disk located at the cable company's facilities. The viewer could then, through controlling his or her cable box, order the show to be transmitted from the cable company's hard disk to the customer's television on demand.

A number of movie studios sued Cablevision for direct infringement of their copyrighted shows. The studios argued that the cable company violated their copyrights by making unauthorized copies of their copyrighted shows on Cablevision's hard disks and then later performing them for the viewer.

Although it chose not to, Cablevision could have made the same argument raised in the copy shop cases. Viewers of broadcast television have a

¹³ *Id.* at 1389 (emphasis added). *See also id.* at 1386.

¹⁴ *Id.* at 1389.

¹⁵ 536 F.3d 121 (2d Cir. 2008).

well-established fair use privilege to record television broadcasts for later personal viewing — so-called “time shifting.”¹⁶ Cablevision’s service arguably did no more than enhance a viewer’s ability to exercise this privilege, making it easier and more efficient. Thus, Cablevision’s actions facilitated the fair use privileges of its customers. If the customers have a clear fair use right to time-shift the shows, it is hard to see why Cablevision should be liable for facilitating this and making this more efficient. Indeed, imposing liability on Cablevision would have the perverse effect of requiring it to intentionally adopt a less efficient technology in order to avoid liability, for example by distributing DVRs individually to each of their customers.

For various procedural reasons, Cablevision never made this argument before the court. Had it done so, however, chances are it would have been rejected for the same reasons articulated in the copy shop cases above. Moreover, once analyzed from the perspective of Cablevision rather than its customers, the fair use defense looks far weaker. Cablevision is a for-profit company engaging in a commercial and nontransformative use, it is copying the entire copyrighted work, the work is creative, and Cablevision could certainly negotiate with the copyright owners to obtain a license for this kind of use (just as it negotiates for rights to make works available through its on-demand service). Thus, if a court refused to consider the fair use arguments of the customers, there is a good chance that Cablevision would be held liable. This is so even though the customers have a very strong fair use argument.

This dynamic also appears, though it has generally not been recognized, in the controversy over companies that edit movie DVDs on behalf of customers. A number of years ago, a company called Clean Flicks provided a service whereby customers could send it movie DVDs that they had purchased and ask Clean Flicks to edit out portions of the movie that were deemed objectionable (i.e., by editing out or blurring scenes containing nudity, violence, or adult language). Clean Flicks made a copy of the movie, edited that copy in accordance with the customer’s wishes, and then returned both the original and the edited copy to the customer.¹⁷ In so doing, Clean Flicks served a market for edited versions of popular movies.

The movie industry sued Clean Flicks for copyright infringement and won.¹⁸ In finding Clean Flicks liable, the court rejected a fair use defense.

¹⁶ See *Sony v. Universal City Studios*, 464 U.S. 417 (1984).

¹⁷ In practice, Clean Flicks retained already-edited versions of the movies and sent copies out to customers who provided them with the corresponding movie DVDs.

¹⁸ *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006).

Just as in the copy shop cases, the court analyzed the fair use defense from the perspective of Clean Flicks and found that the use was commercial and only minimally transformative, that Clean Flicks copied the entire work, that the work was creative, and that the use harmed the market for edited versions of the original movies.

Left unaddressed, as in the previous cases, was the potential customer interest. Had individual purchasers of the DVDs made their own edits to their DVDs for their own viewing purposes, this type of activity would likely have been fair use, as the editing would have been non-commercial and personal, and would not likely have affected the market for the work. At the very least, there would have been a decent fair use argument. Clean Flicks could have made the argument that it was merely facilitating the fair use privileges of its customers.

Indeed, the facilitation argument in this case may be even stronger than in the other cases mentioned above. This is because, unlike the cases above, technology makes it difficult if not impossible for consumers to exercise their fair use privileges on their own. Movies on DVDs are protected by an encryption algorithm, which prevents individuals from easily copying or manipulating the copyrighted movie.¹⁹ Most consumers lack the expertise to defeat the encryption. Thus, to the extent DVD owners wanted to exercise their fair use privileges with respect to the copyrighted movies, they had to rely upon companies like Clean Flicks. Not only was Clean Flicks helpful for engaging in fair use, in this case it was essential.

This argument, however, was never addressed by the court in the Clean Flicks case. The consumer interest in getting access to edited versions of the DVDs was addressed only in passing and quickly rejected by the court, without much discussion.²⁰

The cases above all share a common dynamic. In each case, a company makes a copy of, or a derivative work based upon, a pre-existing copyrighted work and sells the resulting product to a consumer. In each case, if the consumer had engaged in the copying, the consumer would have had a colorable fair use argument. In each case, the company is facilitating the fair use of the consumer, making the fair use more efficient or

¹⁹ Decryption technologies are not widely available to the public as a result of provisions of the Digital Millennium Copyright Act of 1998 (DMCA), 17 U.S.C. § 1201(a)(2), (b) (2006). The DMCA is discussed in more detail *infra*, Part III.B.

²⁰ See also *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 582 (6th Cir. 2007), which involved a copyright claim against a company that made karaoke versions of copyrighted songs without authorization. The defendant argued that it was facilitating the privileged actions of the users of its karaoke songs. The court rejected this argument, citing *Princeton* for the proposition that “the end-user’s utilization of the product is largely irrelevant.”

simply possible. And common to all of these cases is a failure to consider, or outright rejection of, the fair use claims of the company's customers. Instead, courts, to the extent they address this issue at all, focus exclusively on the companies themselves and the extent to which they were contributing to, and profiting from, the unauthorized copying of copyrighted works.²¹ Missing is any consideration of the impact on the ability of the consumers to practically take advantage of their fair use privileges.

B.

The refusal, in these cases, to consider the fair use interests of a company's customers reflects a particular understanding of copyright law and fair use, one that views fair use as primarily a response to market failure.²² Under this very influential view, certain small-scale uses of copyrighted works should be fair because the cost of licensing the use outweighs the value of that use to the potential user. Take, for example, the case of a student who wants to photocopy a journal article she finds in a library. To negotiate a license, she would have to find the copyright owner, contact the owner, negotiate the terms of the license, have it drafted, and pay a royalty. Even if both parties would agree to such a license, the cost of doing all of this would greatly exceed the value of the use itself. Transactions costs prevent the market from achieving the efficient result.

Under a market-failure rationale, fair use should transfer the entitlement in such circumstances to the student in order to achieve the efficient result. The role of fair use is to mimic what the market would achieve in the absence of transactions costs. This view of fair use as a response to market failure provides a powerful explanation for why certain small-scale acts of copying are considered fair use.

Under this view, the copy shop cases make sense. The only reason the students have a right to make photocopies is because the transactions costs of licensing the use are too great. However, once the copy shop steps in as an intermediary, the transactions costs are greatly lowered.²³ The

²¹ There are cases in addition to the ones above, which exhibit this dynamic. *See, e.g.,* UMG Recordings v. MP3.com, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), *discussed in* Liu, *supra* note 7. *See also* Pac. & S. Co. v. Duncan, 572 F. Supp. 1186, 1194-95 (N.D. Ga. 1983), *rev'd on other grounds*, 744 F.2d 1490 (11th Cir. 1984) (refusing to let operator of a TV news clipping service to stand in the shoes of its customers for fair use purposes).

²² *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (articulating the basic framework, though advancing a far more expansive and nuanced notion of market failure).

²³ *See, e.g.,* Robert P. Merges, *The End of Friction? Property Rights and Contract in the Newtonian World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115 (1997).

copy shop can license the right to make copies from the copyright owners far more efficiently. Indeed, in the copy shop cases, the publishing companies pointed out that copy shops other than the defendant had in fact successfully obtained licenses for their coursepacks.²⁴ Thus, under these circumstances, the market does not fail, and there is no need to find the use fair. Under these circumstances, it makes sense to ignore the potential fair use defenses of the students and focus on the actions of the copy shop.

However, this understanding of fair use as market failure is not the only one. Another understanding of fair use, one that pre-dates the market failure rationale, views fair use as affirmatively encouraging certain types of uses that are socially beneficial. Fair use is not solely a response to market failure, but also an important affirmative privilege. Under this view, uses that are related to comment, criticism, education, and news reporting have a privileged status in copyright.²⁵ Imposing liability on these kinds of uses would have the ultimate effect of hindering the kind of progress and dissemination of knowledge that copyright is meant to encourage.²⁶

Moreover, under this view, these uses should be privileged whether or not the user could in theory efficiently seek a license from the copyright owner. That is, these uses are not justified based on market failure, but on the intrinsic value of these uses. Take, for example, a book reviewer's ability to quote from the book in his review. Even if the publishing companies offered a low-cost "book reviewer quotation license," this type of use would be fair, because under this view, fair use is not just limited to cases of market failure. Instead, fair use affirmatively creates space for uses that we want to encourage.

Viewed from this perspective, it is not at all clear why the courts should disregard the fair use rights of the customers when deciding the liability of the companies that facilitate such uses. Under this view, the fair uses are privileged uses, which the copyright act affirmatively values. The companies, under this view, are merely facilitating the fair use privileges of the customers. They are enabling customers to exercise their fair use privileges in a far more effective and efficient manner. Under this

²⁴ See *Princeton*, 99 F.3d at 1387 (noting that other copy shops obtained licenses from the copyright owners); *American Geophysical Union v. Texaco*, 60 F.3d 913, 926 (2d Cir.1994).

²⁵ See 17 U.S.C. § 107 (2006) ("[F]or purposes such as criticism, comment, news reporting, teaching, scholarship, or research. . . ."); see, e.g., Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997).

²⁶ See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (Story, J.).

affirmative view of fair use, it is not at all clear why all of the benefits of this increased efficiency should belong entirely to the copyright owners.

In fact, there are good reasons to believe just the opposite. Return to the example of the children's drawings from the beginning of this Essay. The drawings made by these children are fair uses, not because it would be too costly for the schools to get licenses from the copyright owners, but because there is an affirmative value in encouraging the education and personal creativity of small children. These uses are not grudging exceptions to expansive copyright liability, but instead precisely the kinds of uses that are to be most celebrated. These are not uses that we simply tolerate, but uses that we want to encourage.

If this is the case, then the actions of the company look quite different. The company is not making money off of the copyrighted works of the copyright owners. (Indeed, it is hard to believe that the value of the company's products to the parents is materially affected by the inclusion or exclusion of copyrighted subject matter by the children.) Rather, it is making it possible for the children to exercise their creative impulses more fully. The company is enabling and facilitating the fair use privileges of the children. And although the company is turning a profit, the profit is merely the reward it properly receives for facilitating these fair uses and enabling the creativity of the children. It is precisely the kind of reward that the market gives companies for making certain socially-desirable activities more efficient.

Which of these competing perspectives to adopt depends on the nature of the underlying fair use. I am certainly not saying that in every case, the intermediary company should be entitled to proceed without liability. If, for example, the company encouraged children not to draw their own pictures but to clip out and send in photos of clearly copyrighted works, this would look quite different. And it is quite possible that the copy shop cases were correctly decided, insofar as the fair use arguments of the students and professors were not entirely clear cut and implicated a particular market for educational materials. Accordingly, a fair use claim by the users should not always be dispositive.

I am saying, however, that the fair use interests of the users should be relevant, and that current law, in categorically ignoring those interests, misses an important part of the picture. Current law draws little distinction between the company that puts the drawings of grade schoolers on t-shirts and mugs, and the company that makes pirated versions of licensed t-shirts and mugs. Current law fails to consider the impact of copyright liability on the fair use privileges of individuals. Rather than refusing to consider the fair use interests of the customers and treating such interests as a residual interest to be eliminated by more efficient markets, courts

should instead analyze those interests expressly and consider how they are affected by the imposition of copyright liability on the companies.

More broadly, the approach currently taken by the courts reflects a particularly cramped understanding of copyright and fair use, one that views this issue primarily from the perspective of the copyright owners. While this view is very important, it is just as important that we keep in mind the perspective of potential fair users and, crucially, not just their theoretical privilege to engage in fair use, but the broader context and environment within which they exercise that privilege.

C.

Before discussing how copyright law can take customer fair use interests into account in these cases, I want to spend a bit of time discussing one area where copyright already considers these interests extensively. By focusing on an area where customer fair use interests are already considered, I hope to show how anomalous it is that they are not considered in the cases above. Indeed, the proposal in this Essay would make consideration of customer fair use interests more consistent.

Customer fair use interests play an important role in the area of third-party or indirect copyright liability. Under some circumstances, copyright law extends liability beyond the direct infringer to those who knowingly facilitate infringement. For example, one who sells a commercial DVD-copying machine to a person who is clearly going to use it to make unauthorized DVDs would be liable for copyright infringement, even though the seller of the machine is not making or selling the copies himself or herself.

In sharp contrast to the direct liability cases mentioned above, courts in these indirect liability cases spend extensive time and effort analyzing the fair use claims of the customers. Take, for example, *Lewis Galoob Toys v. Nintendo of America*.²⁷ In that case, Nintendo made and sold a video game console that accepted cartridges containing video games. The defendant, Galoob, made a device called the Game Genie, which consumers could interpose between the game cartridge and the video game console. The Game Genie permitted end-users to alter the game play of certain Nintendo games, by for example increasing the number of lives or speeding up the game play.

Nintendo sued Galoob for copyright infringement, arguing that the altered games produced by use of the Game Genie were unauthorized derivative works based on the original copyrighted video games. Although these altered games were, strictly speaking, created by the Game Genie customers, Nintendo argued that Galoob should be held liable for contrib-

²⁷ 964 F.2d 965 (9th Cir. 1992).

uting to the infringing activity. Galoob defended by arguing that the customers who used the Game Genie were engaging in fair use, since they were engaging in a private, non-commercial use that had no impact on the market for video games. Nintendo responded by arguing that fair use should be measured, not from the perspective of the customers, but from the perspective of Galoob. And since Galoob's use was commercial and not private, Galoob should not be entitled to a fair use defense.

Galoob thus presented a question similar to that raised in the cases in the previous section: to what extent should a court consider the fair use claims of a company's customers? Unlike the courts in the direct infringement cases, however, the court in *Galoob* expressly chose to analyze fair use from the perspective of the end-user and expressly rejected the argument that it should analyze fair use from the perspective of Galoob. Having made this decision, the court went on to conclude that the end-user's use of the Game Genie constituted fair use, and therefore Galoob could not be liable for contributory liability.

Another example of judicial solicitude toward customer fair use claims can be found in *Sony v. Universal City Studios*.²⁸ The case involved a contributory liability claim brought by movie studios against Sony, the manufacturer of the VCR. The movie studios claimed that Sony customers were committing copyright infringement by using Sony's VCRs to make unauthorized copies of copyrighted television broadcasts, and that Sony should be contributorily liable for knowingly facilitating this infringing activity.

The Supreme Court's opinion in *Sony* placed great weight on the fair use claims of Sony's customers. The court held that some customers used the VCR to record broadcast television shows for later viewing, and that this "time shifting" was fair use, since it was private, non-commercial, and had no impact on the market for the television shows. The court then held that, because the VCR was capable of substantial non-infringing uses by Sony customers, Sony could not be held liable for contributory infringement. Again, unlike the direct infringement cases discussed in the previous section, the *Sony* opinion analyzed fair use from the perspective of Sony's customers.

What explains the different attitude toward the fair use claims of customers in these cases? The answer is relatively straightforward and lies in the doctrinal basis for indirect liability. For there to be indirect liability, there must first be direct liability. If the end-users are engaging in fair use, there is no direct liability and therefore no secondary liability. Thus, there is a doctrinal hook for consideration of customer fair use arguments. In the direct liability cases, by contrast, there is no similar doctrinal hook,

²⁸ 464 U.S. 417 (1984).

since the company itself is engaging in the copying. The company's liability does not depend on the customer's liability. Courts have thus generally ignored the customer's fair use arguments and focused exclusively on the fair use arguments of the company itself.

Although there may be a good doctrinal reason for completely ignoring customer fair use arguments in the direct liability cases, there is, as I have argued above, no good policy reason for doing so. In the indirect liability cases, the courts are acutely aware of the potential impact that imposing copyright liability on the companies may have on the companies' customers. This concern animates the decisions in *Sony*, *Galoob*, and many other indirect liability cases. Thus, for example, whether to impose liability on Sony is heavily affected by the potential impact on Sony's customers and their ability to engage in fair uses.

Many of these exact same concerns exist in the corresponding direct liability cases. Companies like the t-shirt and mug company, the copy shops, and the DVD-editing companies all provide services that facilitate the fair use privileges of their customers. Imposing liability on these entities may have a significant impact on the practical ability of these individuals to exercise their fair use privileges. This concern need not be dispositive of the issue of liability, but it should at least enter into a court's calculations. The basic point is that this same policy concern appears in both the direct and indirect liability cases.

Indeed, highlighting the problematic nature of this differential treatment, it is not always completely clear whether a particular case is a direct or indirect liability case. In *Cartoon Network*, for example, the court spent a good deal of time deciding who was the direct infringer: the cable company that set up the automated recording system or the consumer who determined which television shows to copy?²⁹ A case could be made for either party. Indeed, the district court initially held that the cable company was the direct infringer.³⁰ On appeal, however, the court ultimately concluded that the customer was responsible for making the copy. Although Cablevision set up the equipment that enabled the customer to copy the television shows, the customer decided which shows to copy and when to later view the shows. Accordingly, the appellate court held that Cablevision could not be held directly liable.³¹

²⁹ 536 F.3d 121 (2d Cir. 2008) (ultimately concluding that the customers were responsible for making the copies).

³⁰ *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y.2007) (Cablevision I).

³¹ Similarly, in *Religious Technology Center v. Netcom*, 907 F. Supp. 1361 (N.D.Cal.1995), the court determined that, although Netcom's servers were making and distributing copies, it was doing so at the behest of end-users who were uploading and downloading the copyrighted content.

In theory, even though Cablevision was not directly liable, it could still have been liable for contributory infringement for facilitating the copying by the customers. In fact, however, this claim was foreclosed because, during the negotiations leading up to the district court's decision, the plaintiffs agreed to waive their contributory infringement claim in exchange for Cablevision's agreement not to raise a fair use defense. However, if the movie studios had brought a contributory liability claim, Cablevision would have been able to raise the fair use arguments of its customers, just as Sony did. Moreover, such a claim would have been reasonably strong.

Note, however, that if the court had instead decided that Cablevision was directly responsible for the copying, the treatment of the customers' fair use claims would have been very different. Under current doctrine, any potential fair use arguments of Cablevision's customers would have been completely irrelevant. The court would have measured fair use from Cablevision's perspective and completely ignored any fair use arguments from the customers. Yet the same policy considerations are present, whether the basis for liability is direct or indirect. In either situation, imposing liability on Cablevision would have a significant impact on the legitimate fair use privileges of Cablevision's customers. It makes little sense to find end user fair use rights completely dispositive in one context and completely irrelevant in the other.

This is particularly true as technologies begin to further blur the distinction between direct and indirect liability. *Cablevision* is but an example of a trend. Increasingly, companies are not content to sell devices that enable consumers to manipulate copyrighted materials. Rather, companies seek to maintain a more interactive relationship with their customers, providing services rather than just technologies. As this trend intensifies, we may well see an increasing dependence on the part of consumers on the actions of these companies. If so, then it becomes even more important to consider how liability for these companies affects their customers.

In many ways, the extension of end-user fair use arguments to direct liability cases is the mirror image of the extension of indirect copyright liability based on end-user actions. In the indirect liability cases, the com-

Both *Cartoon Network* and *Netcom* suggest that one way to preserve end-user rights in such cases would be to hold that the end-user is actually responsible for the copying, and that the company, by setting up an automatic system, is not in fact directly copying. While this approach does have some appeal, it is likely only to apply in cases where the company's systems are so automatic that a court could reasonably find a lack of volition. It would probably not be available to cases, like the DVD editing case or the children's example, where the system is not so automated. More problematically, it would ignore the wider context and the underlying policy concerns that could be balanced through a fair use approach.

panies are not themselves liable, but can be held liable under certain circumstances for the infringing actions of their customers. They are subject to end user liability. By the same token, companies subject to direct infringement liability should be able to invoke some of the fair use defenses of their customers. They should be entitled to invoke end user defenses. In other words, the invocation of customer interests should not run only one way, in favor of expanding liability, but the other way as well, in favor of limiting liability.

This is not merely a matter of formal symmetry. Rather it highlights the importance of fully considering the impact of liability on the ability of consumers to fully and effectively exercise their fair use privileges. This interest should be given the same consideration and equal weight as the interest in reducing infringement.

III.

A.

If the fair use claims of the customers should, as a theoretical matter, be relevant, how should they be incorporated as a doctrinal matter? One way would be to simply factor in the fair use interests of the customers into the fair use arguments of the company, an avenue I have proposed elsewhere.³² One advantage of such an approach is that it would be easier to implement as it does not require much doctrinal change. Courts could simply consider customer fair use interests their consideration of the overall fair use defense raised by the company.

An alternative, and one that I am promoting here, would be to expressly recognize a separate defense of fair use enablement. A company should be able to argue that its activities are privileged to the extent that it is enabling certain socially productive fair uses. The advantage of a separate defense is that it would require courts to independently consider the impact of liability on the interests of the company's customers, bringing such interests to the fore. Although this would require a bit more doctrinal innovation, it would still fit comfortably within the courts' tradition of construing fair use flexibly, in this case to more fully vindicate the interests underlying fair use.

In assessing the availability of this defense, the first step would be to determine whether the actions, if performed by the customer, would amount to fair use. If they would not, then the defense would of course be unavailable. Thus, for example, in the copy shop cases, if a court determined that similar copying by the students or professors was not fair use, then this would end the matter. At the very least, however, there would

³² Liu, *supra* note 7.

be a determination of the fair use claims of the customer, a determination that is currently missing from the doctrine.

If a court concludes that the use is fair, however, the next step would be to determine the extent to which the defendant is facilitating the values underlying the fair use. In some cases, the value may be non-economic. For example, in the case of the children's artwork, the company is helping grade-school students find a wider audience for their creative efforts. This kind of non-economic interest would weigh in favor of the defense. In other cases, the value may be primarily economic. For example, in the *Cartoon Network* case, the cable company is primarily making it less costly and more convenient for consumers to view recorded shows. This kind of economic interest would weigh less heavily in favor of the defense. In yet other cases, there may be a mix of fair use interests. For example, in the copy shop cases, the copy shops are both encouraging education and reducing costs. In all of the above situations, a court would need to look into the kind of consumer interest that the fair use defense is vindicating.

This inquiry would also involve an assessment of the extent of the benefit that the company is conferring, based on its actions. How much help is the company giving to those who would exercise their fair use privileges? What is the magnitude of the benefit? This would also involve assessing the extent to which customers need the services of the company — i.e., the extent to which they could, if they wanted to, engage in the fair use themselves. If customers would largely be able to engage in the same range of fair uses without assistance, then the defense would be unavailable. Conversely, if fair uses would effectively be barred without assistance of the company, as is arguably the case with the edited DVDs, then this would weigh heavily in favor of fair use.

Finally, a court would weigh the benefit conferred by the company to customer fair use interests against the potential impact on copyright incentives. Ultimately, any fair use analysis must take account of the potential to harm the market for the copyrighted work. Thus, even if a company is facilitating the fair use rights of its customers, it is possible that, merely by making the exercise of these rights more efficient, the company will be significantly hurting the copyright owner's market. If this is the case, and if the harm outweighs the benefits from the fair use, then the defense would be unavailable. If, on the other hand, there is no impact on the copyright owner's market, then the use should prevail.

To see how this defense would work in practice, it may help to run through a number of the examples mentioned above. In the case involving the grade-school children, the defense would be pretty clearly available. The children's uses are almost certainly fair. Moreover, the fair use is of a particularly privileged kind, not one based purely on market failure. The company's actions facilitate the exercise of this use. Finally, there is no

argument that this has any impact on the copyright owner's direct market.³³ Thus, the defense would allow the company to accept drawings by the children without fear of liability.

The copy shop cases would be a closer call. First, it is not at all clear that the customers' uses would be fair. While the purpose of the copying is clearly to facilitate education and study, the copying can in some cases be rather extensive. Moreover, there is likely to be a non-trivial impact on the market for these works, particularly in the aggregate, as they are often aimed at educational markets. So the initial assessment of fair use would be a close call. Moreover, the nature of the fair use claim would also be somewhat ambiguous, as it is grounded in both the traditional notion of fair use (as facilitating education) and the market failure rationale.

If the use by the students is determined to be fair, then the copy shops facilitate this use, by making it more efficient. At the same time, however, it is not as though the students themselves would be prevented from exercising their rights if the copy shops were prevented from engaging in this activity. In theory, students would still be able to make their own copies, using photocopy machines, although this would certainly be less convenient and more costly. Thus, the facilitation by the copy shops is more minimal. Finally, there is a real potential for this activity to harm, not just some theoretical licensing market, but the direct market for the works, as these course packs likely displace at least some sales.

Thus, on balance, an enablement defense would be less likely in the case of the copy shops. However, the defense would at least permit courts to consider the fair use interests of the students. It would permit courts to consider how imposing liability on the copy shops might affect the fair use interests of the students.

Finally, the DVD-editing companies would likely have a strong enablement defense. If consumers edited their own DVDs, they would likely have a strong fair use defense, insofar as the activity is private, non-commercial, and has no impact on the market for DVDs.³⁴ (Indeed, the ability to edit DVDs would probably expand the market for those movies.) Moreover, the DVD-editing companies play an essential role in enabling fair use, as the consumers themselves do not have the technical expertise

³³ It is true that there is a theoretical harm to the indirect market for licenses. Putting aside for now the well-noted problem of circularity in this argument, in this particular case, the nature of the fair use interest would preclude consideration of the licensing market. The children's use would be fair whether or not the schools could easily secure a license. In other cases, consideration of the indirect market for licenses would similarly depend on the nature of the underlying fair use interest.

³⁴ See, e.g., *Lewis Galoob Toys v. Nintendo of Am.*, 964 F.2d 965 (9th Cir. 1992).

to edit the DVDs.³⁵ Finally, the provision of this service is unlikely to have a material impact on the market for DVDs, as it requires consumers to first purchase the DVD before having it edited.³⁶ Thus, there is a decent chance that these companies would be able to take advantage of this defense.

In all of these cases, a defense of fair use enablement would recognize the important role that these companies play in facilitating and enabling certain favored fair uses. It would also recognize that fair use is not a privilege that can be exercised in isolation, but one that may require certain conditions to thrive.

B.

Although this Essay has suggested reforms for one particular doctrine in copyright, the implications are significantly broader. As the above examples suggest, a focus on enabling fair uses will only become more important as digital technology allows individuals to engage in more individual creativity.³⁷ We are seeing this already in the explosion of user-generated content. Whether we call it peer production,³⁸ amateur content,³⁹ remix culture,⁴⁰ or consumer or user creativity,⁴¹ it is clear that digital technology and networked communications systems are making it much easier for individuals to create and to distribute their creative materials, to become less passive in their consumption of copyrighted works, to engage far more actively and creatively with copyrighted works. To behave, in short, increasingly like the children in my daughter's class.

³⁵ Note that the DVD-editing companies might still face liability for circumvention under 17 U.S.C. § 1201(a)(1). An analysis of this issue is beyond the scope of this Essay.

³⁶ For this same reason, any impact on the market for edited versions of the movie would be largely irrelevant, as the service does not in fact displace any sales (unless the movie studios could show that consumers would buy an edited version in addition to the original version, which seems unlikely).

³⁷ See, e.g., Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004).

³⁸ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2007).

³⁹ Hunter & Lastowka, *supra* note 37.

⁴⁰ LESSIG, *supra* note 8.

⁴¹ Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003); Julie E. Cohen, *The Place of the User in Copyright Law*, *supra* note 37.

The issue I highlight in this short Essay suggests that we need to pay greater attention to the conditions that make this kind of creativity possible. It is not enough to say that individuals have the right to engage in creative uses of copyrighted works in the privacy of their own homes, and only to the extent that they themselves have the technical know-how to do so. Rather, it is important to make sure that those who facilitate and enable such creative uses, whether by providing an important technology or permitting communication of the results, be sheltered from liability too.

Current law does recognize this interest already, to some extent. As already mentioned above, this interest is recognized in the area of indirect liability and the regulation of technologies that facilitate fair use. The *Sony* doctrine and subsequent cases interpreting *Sony* are expressly driven by concerns that extending third-party liability too broadly can have a negative impact on the practical ability to engage in fair use.⁴² *Sony* is thus careful about not eliminating certain technologies from the market. This reflects recognition that consumers may need access to technologies in order to exercise their fair use rights. As I have argued here, this interest should extend not only to technologies, but to services as well. This will only become more important as technology providers enter into increasingly interactive relationships with their customers.

Unfortunately, this awareness of the importance of enabling technologies is not apparent in other areas of copyright law. Perhaps the most egregious example is in the Digital Millennium Copyright Act's provisions involving anti-circumvention.⁴³ Enacted by Congress in 1998, the DMCA gives copyright owners an additional cause of action against those who circumvent technological measures (such as the encryption used to protect DVD movies) designed to control access to copyrighted materials.⁴⁴ It also contains a provision that outlaws the sale and distribution of technologies that facilitate circumvention — the so-called “tools provision.”⁴⁵

Concerned that this new form of liability might have the effect of limiting fair use rights of individuals and third-parties, Congress provided a number of statutory exemptions.⁴⁶ It also gave the Librarian of Congress the power, through regulation, to exempt certain classes of works from circumvention liability.⁴⁷ Congress did not, however, provide any exemptions for liability under the tools provision. Thus, Congress placed consumers in the curious position of having the right to circumvent under certain circumstances, but no readily available access to technologies that

⁴² 464 U.S. 417 (1984).

⁴³ 17 U.S.C. § 1201(a)(2), (b) (2006).

⁴⁴ *Id.* § 1201(a)(1).

⁴⁵ *Id.* § 1201(a)(2), (b).

⁴⁶ *Id.* § 1201(d)–(k).

⁴⁷ *Id.* § 1201(a)(1)(C).

would help them exercise those rights. These provisions are a particularly extreme example of the failure to consider the extent to which formal legal privileges can practically be exercised.

At the same time, other parts of the DMCA do appear to recognize, albeit indirectly, an interest in facilitating consumer fair use privileges. In particular, the DMCA provides a safe harbor for companies that host user-generated and user-loaded content.⁴⁸ This is what permits companies like YouTube to host videos uploaded by customers without fear of crippling liability.⁴⁹ Although the safe harbor was enacted primarily at the behest of Internet intermediaries concerned about liability, it has had the effect of enabling a tremendous amount of consumer creativity. The breathing space created by these safe harbors is an example of an issue that deserves more attention: i.e., the role of intermediaries in facilitating and encouraging creative consumer fair uses. This interest should apply, not only to internet intermediaries, but all companies that facilitate this interest.

IV.

In the end, my daughter has not been permanently damaged by U.S. copyright law. She continues to draw and to express herself through art. I have managed to convince her that, as long as she does not commercialize the results, she is perfectly free to draw any “famous” character that she likes. So I doubt there will be any long-lasting harm to her psyche. (Certainly, any such harm is likely to be swamped by all of the other kinds of long-lasting harm her parents are inadvertently inflicting upon her.)

Yet I can’t help noticing that she is more careful now when she draws. She will check with me, sometimes, to see whether she can draw something. She will ask me about things that her friends do, to make sure that they aren’t copyright violations. She is probably far more aware of copyright law than many nine-year olds. The copyright industries may well be quite happy with this result, as they have invested much in recent years in an effort to educate children about copyright law.⁵⁰ Despite my love of copyright law, I can’t help feeling a bit sad.

⁴⁸ *Id.* § 512.

⁴⁹ *But see* *Viacom v. YouTube*, 2010 WL 2532404 (S.D.N.Y. June 23, 2010) (holding that YouTube fell within the scope of the safe harbor).

⁵⁰ *See, e.g.*, Copyright Society of the U.S.A., Elementary School Teacher Curriculum Materials for Copyright Awareness Week, *available at* http://www.csusa.org/caw/caw_2006_home.htm (last visited Feb. 13, 2010).